

# Time, Place, and Manner Restrictions on Speech

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*The category of time, place, and manner restrictions on speech, as supposedly distinct from absolute bans, appears to be central to free speech law. Even a modest examination of the case law, however, suggests the arbitrariness of any such distinction. Any familiar time, place, or manner restriction on speech can be reasonably re-described as an absolute ban on speech, and vice versa. Any differences in how the relevant regulations of speech should be judicially tested, whether by differing degrees of rigor or otherwise, are correspondingly arbitrary.*

*This Article recommends abandoning any attempt to substantively distinguish between time, place, and manner restrictions and absolute prohibitions of speech. The three currently used judicial tests for presumed content-neutral restrictions on the supposed time, place, and manner of speech should be substantially revised and consolidated. Any replacement test should then de-emphasize concerns for any degree of narrowness of tailoring, focusing instead on whether the regulated speakers are now meaningfully worse off, in terms of their own free speech values, given whatever channels of communication remain available to them after the speech regulation in question has been imposed.*

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## I. INTRODUCTION

The category of time, place, and manner restrictions on speech, as supposedly distinct from absolute bans, appears to be central to free speech law.<sup>1</sup> Even a modest examination of the case law, however, suggests the arbitrariness of any such distinction.<sup>2</sup> Any familiar time, place, or manner restriction on speech can be reasonably re-described as an absolute ban on speech, and vice versa.<sup>3</sup> Any differences in how the relevant regulations of speech should be judicially tested, whether by differing degrees of rigor or otherwise, are correspondingly arbitrary.<sup>4</sup>

As it turns out, even the most promising attempts to reconceive and to then validate the time, place, and manner versus absolute ban distinction are unavailing.<sup>5</sup> Compounding the problem is the dependence of the law of time, place, and manner restrictions on an independently flawed distinction between content-based and content-neutral restrictions on speech,<sup>6</sup> and on three dubious current judicial tests for content-neutral restrictions on speech, no two of which tests are realistically equivalent.<sup>7</sup>

This Article recommends abandoning any attempt to substantively distinguish between time, place, and manner restrictions and absolute prohibitions of speech.<sup>8</sup> The three currently used judicial tests for presumed content-neutral restrictions on the supposed time, place, and manner of speech should be substantially revised and consolidated. Any replacement test should then de-emphasize concern for degrees of narrowness of tailoring.<sup>9</sup> Instead, the courts should, in accordance with the basic underlying logic of freedom of speech, focus crucially on whether the regulated speakers are now meaningfully worse off, in terms of their own free speech values, giv-

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1. See *infra* notes 11-13 and accompanying text.
  2. See *infra* notes 57-90 and accompanying text.
  3. See *id.*
  4. See *id.*
  5. See *infra* notes 91-99 and accompanying text.
  6. See *infra* notes 100-123 and accompanying text.
  7. See *id.* (drawing upon notes 33-56 and accompanying text.).
  8. See *infra* Section III.
  9. See *infra* notes 116-123 and accompanying text.

en whatever channels or means of communication remain available to them after the speech regulation in question has been imposed.<sup>10</sup>

## II. INTRODUCING THE DISTINCTION AND ITS ASSOCIATED LEGAL TESTS

The category of legal restrictions on the time, place, or manner of speech is widely familiar and well-established. A leading First Amendment expert, Professor Robert Post, has declared that such cases involve “among the most important and most frequently invoked<sup>11</sup> contemporary First Amendment tests.”<sup>12</sup>

This common<sup>13</sup> judicial recourse to the category of time, place, or<sup>14</sup> manner (below, frequently, abbreviated as TPM) restrictions has been re-curringly validated by Supreme Court decisions. Merely for example, the postal walkway public forum case of *United States v. Kokinda*<sup>15</sup> clearly seeks to distinguish TPM regulations of solicitation speech from an absolute prohibition<sup>16</sup> on such speech, or from permitting “no manner of solicitation at any time or at any place in the forum.”<sup>17</sup> Crucially, the idea of alternative ways of speaking, apart from on-the-spot solicitation, and of alternative venues in which to speak, whether involving any solicitation or not, are simply not meaningfully explored by the Court in *Kokinda*.<sup>18</sup>

The courts generally assume that when a speech regulation “is simply a time, place, or manner regulation rather than a total ban of a particular

10. See *infra* notes 124-132 and accompanying text.

11. A Westlaw search of the state and federal cases database for “‘time, place, and manner’ /s speech” yielded 2,956 citations as of December 30, 2019.

12. Robert C. Post, *Recuperating First Amendment Doctrine*, 47 STAN. L. REV. 1249, 1260 (1995); see Joseph Blocher, *Bans*, 129 YALE L.J. 308, 314, 324-25 (2019) (“[T]he characterization of a law as a ban tends to trigger a per se rule of invalidity . . .”); see also William E. Lee, *Lonely Pamphleteers, Little People, and the Supreme Court: The Doctrine of Time, Place, and Manner Regulations of Expression*, 54 GEO. WASH. L. REV. 757, 758 (1986) (“[T]he Court gives only the most cursory scrutiny to time, place, and manner regulations of inexpensive forms of communications.”).

13. See Post, *supra* note 12.

14. We herein ignore the distinction between regulations of time, place, *or* manner and regulations of time, place, *and* manner. Despite the logical importance of distinguishing between disjunction (“or”) and conjunction (“and”), this distinction in the case law context is unproblematic.

15. *United States v. Kokinda*, 497 U.S. 720 (1990).

16. See *id.* at 755.

17. *Id.* (emphases omitted). For further Supreme Court references to, or attempts to draw, a distinction between absolute prohibitions and TPM regulations of speech, see, for example, *City of Cincinnati v. Discovery Network*, 507 U.S. 410, 430-31 (1993) (in the context of regulating commercial, but not other sorts of, news racks); *R.A.V. v. City of St. Paul*, 505 U.S. 377, 397, 408-09 (1992) (White, J., concurring) (“A prohibition on fighting words is not a time, place, or manner restriction . . .”).

18. See *Kokinda*, 497 U.S. at 755.

medium of expression”<sup>19</sup> we should recognize that “different factors come into play.”<sup>20</sup> No such differences in judicial analyses would be thought necessary unless there were some sufficient substantive difference between TPM regulations and absolute bans. On this assumption, it is thought that a greater level justification may be required “when the speech regulation takes the form of a ban, rather than a time, place, or manner restriction.”<sup>21</sup> Thus, an “absolute prohibition”<sup>22</sup> of speech, as explicitly distinct from a “mere regulation of speech,”<sup>23</sup> is claimed to be more strongly disfavored, and “has withstood constitutional scrutiny only in rare circumstances.”<sup>24</sup>

At least in part, “complete speech bans”<sup>25</sup> are thought to be significantly different from, and generally worse than, “restrictions on the time, place, or manner of expression”<sup>26</sup> on the theory that they are “particularly dangerous because they all but foreclose alternative means of disseminating certain information.”<sup>27</sup> Complete bans, as distinct from TPM regulations, are thus often imagined to leave potential speakers with no appropriate alternative channels in which to effectively express their ideas.<sup>28</sup>

Under the Court’s developing case law, restrictions on speech that are judged to amount to an absolute bar or a flat prohibition on speech are deemed to be either absolutely, or else “presumptively,”<sup>29</sup> invalid, at least where the restriction is thought to be based not merely on the content of the speech, but more specifically, on its viewpoint.<sup>30</sup> Whether this logic should

19. *Metromedia, Inc. v. City of San Diego*, 453 U.S. 490, 521, 527 n.6 (1991) (Brennan & Blackmun, JJ., concurring).

20. *Id.* (Brennan & Blackmun, JJ., concurring); *see also, e.g., Excalibur Group v. City of Minneapolis*, 116 F.3d 1216, 1219-20 (8th Cir. 1997).

21. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 310-311 n.1 (2000) (Souter, J., concurring in part and dissenting in part).

22. *United States v. Thompson*, 687 F.2d 1279, 1287 n.6 (10th Cir. 1982) (McKay, J., dissenting) (citing Geoffrey R. Stone, *Fora Americana: Speech in Public Places*, 1974 SUP. CT. REV. 233, 239-45 (1974)).

23. *Thompson*, 687 F.2d at 1287 n.6.

24. *Id.* (citing *Grayned v. City of Rockford*, 408 U.S. 104, 115-16 (1972)).

25. *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 501 (1996) (Stevens, J.) (commercial advertising case).

26. *Id.*

27. *Id.* But *see* the alternative speech channels analysis *infra* notes 124-132 and accompanying text.

28. *See infra* Section III for complications and critique.

29. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2299 (2019) (quoting *Rosenberg v. Rec-tor & Visitors of Univ. of Va.*, 515 U.S. 819, 829-30 (1995)); *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015) (apparently equating “no power to restrict” with a rebuttable, but strong, presumption against viewpoint and content-based restrictions on speech).

30. *See* the authorities cited *supra* note 29; *Matal v. Tam*, 137 S. Ct. 1744, 1765 (2017) (describing viewpoint-based discrimination as “a form of speech suppression so potent that it must be subject to rigorous constitutional scrutiny,” with that test then deemed

extend not just to bans but to TPM restrictions on the basis of viewpoint may depend upon whether the basic distinction between absolute prohibitions and TPM regulations can be sustained.<sup>31</sup>

Content-based restrictions on speech, as a more general category, are classically addressed by some form of strict scrutiny, thus requiring a compelling governmental interest deemed to be at stake, along with sufficiently close tailoring of the purpose of the regulation to its effects on the interests of affected parties.<sup>32</sup> Content-neutral restrictions on speech, in general, are tested rather differently.

Most importantly for our purposes, speech restrictions that are deemed, on whatever logic, to be both content-neutral and to bear only upon the time, place, and manner of the expression of the speech are subjected to one of three judicial tests. These tests are commonly thought, mistakenly or not, to be less demanding in their rigor than classical strict scrutiny. And the three tests are also commonly thought, again mistakenly or not, to be more or less equivalent in practice.

Thus the Court has declared, first, that

the government may impose reasonable restrictions on the time, place, or manner of protected speech, provided the restrictions “are justified without reference to the content of the regulated speech, that they are narrowly tailored to serve a significant governmental interest, and that they leave open ample alternative channels for communication of the information.”<sup>33</sup>

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to have been failed in *Tam*) (Kennedy, Ginsburg, Sotomayor & Kagan, JJ., concurring in part and concurring in the judgment).

31. See *infra* Section III. Of course, since a trademark registration ‘ban’ leaves the mark’s general use in commerce otherwise open and unregulated, see *Tam*, 137 S. Ct. at 1752, one might well describe the registration “ban” in *Tam* as a restriction on the time, place, or manner of the use of the mark.

32. For the Court’s most recent elaboration of a strict scrutiny test for content-based restrictions on speech, however ultimately satisfactory, see *Reed*, 135 S. Ct. at 2226, 2231 (striking down a number of local restrictions on the display of non-commercial signs). For instances of content-based speech restrictions surviving strict scrutiny, see, for example, *Holder v. Humanitarian Law Project*, 561 U.S. 1 (2010); *Burson v. Freeman*, 504 U.S. 191 (1992). For broad critique of the use and coherence of this category, see R. George Wright, *Content-Neutral and Content-Based Regulations of Speech: A Distinction That Is No Longer Worth the Fuss*, 67 FLA. L. REV. 2081 (2015); R. George Wright, *Content-Based and Content-Neutral Regulation of Speech: The Limitations of a Common Distinction*, 60 U. MIAMI L. REV. 333 (2006).

33. *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989) (quoting *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)), quoted in *McCullen v. Coakley*, 573 U.S. 464, 477 (2014). See also, e.g., *Price v. City of Chicago*, 915 F.3d 1107, 1112

This test, which both screens for<sup>34</sup> and then applies to content-neutral regulations of TPM restrictions, may be referred to as the *Clark* test.<sup>35</sup>

The *Clark* case itself, however, also endorses an alternative test, devised originally for use in cases of content-neutral regulations of symbolic speech, or of mixed speech and conduct.<sup>36</sup> This alternative test is drawn from the draft card burning case of *United States v. O'Brien*.<sup>37</sup> *Clark* refers to the *O'Brien* test as “in the last analysis . . . little, if any, different from the standard applied [in *Clark*] to time, place, or manner restrictions”<sup>38</sup> on speech.

The supposedly equivalent *O'Brien* test, in turn, holds that

a government regulation is sufficiently justified if it is [otherwise] within the constitutional power of the Government; if it furthers an important or substantial government interest; if the government interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment freedoms is no greater than essential<sup>39</sup> to the furtherance of that interest.<sup>40</sup>

While these tests will be briefly compared below,<sup>41</sup> we merely note here that while the *Clark* and the *O'Brien* tests are thought to be functionally equivalent, at least over some significant range of cases,<sup>42</sup> it is clear that *Clark* and its progeny require that ample alternative speech channels be left

(7th Cir. 2019) (quoting *Ward*, 491 U.S. 781); *City of New Orleans v. Clark*, 251 So. 3d 1047, 1053 (La. 2018). The Supreme Court *Clark* case involved symbolic speech in the form of sleeping in tents in public parks. See *Clark*, 468 U.S. at 289.

34. Note the requirement that the speech regulation at issue be “justified without reference to the content of the regulated speech.” *Ward*, 491 U.S. at 791.

35. *Ward* in particular seeks to take the edge off of any unduly rigorous narrow tailoring requirement. See *Ward*, 491 U.S. at 798-800.

36. See *Clark*, 468 U.S. at 298-99; see also, e.g., *Doe v. Landry*, 909 F.3d 99, 108 (5th Cir. 2018) (recognizing *Clark*'s endorsement of the *O'Brien* symbolic or mixed speech and conduct test as supposedly equivalent in practice to the *Clark* test itself).

37. *United States v. O'Brien*, 391 U.S. 367 (1968).

38. *Clark*, 468 U.S. at 298.

39. But see *supra* note 35 (regarding the degree of tailoring thought to be required).

40. *O'Brien*, 391 U.S. at 377. See also, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. 277, 296-97 (2000) (plurality opinion) (applying the *O'Brien* test explicitly in the context of a local prohibition on nudity in public places); *Turner Broad. Sys., Inc. v. FCC*, 520 U.S. 180, 189 (1997) (Kennedy, J.) (applying the *O'Brien* test explicitly in the context of federal rules requiring cable television systems to carry local broadcasting).

41. See *infra* Section III.

42. See *supra* note 36.

open and available for the regulated speakers,<sup>43</sup> whereas *O'Brien* and its progeny equally clearly do not.<sup>44</sup>

The third current test for content-neutral time, place, and manner restrictions is expressed in the erotic movie theater zoning case of *City of Renton v. Playtime Theatres, Inc.*<sup>45</sup> and elsewhere.<sup>46</sup> The purported time, place, and manner regulation<sup>47</sup> in *Renton*, conceived of as either content-neutral, or at least as fairly treatable as content-neutral,<sup>48</sup> was explicitly held to be constitutionally acceptable if such a regulation is “designed to serve a substantial government interest and does not unreasonably limit alternative avenues of communication.”<sup>49</sup>

Thus, fascinatingly, the *Renton* case and its progeny<sup>50</sup> adopt a test for content-neutral TPM regulations that explicitly differs from both *Clark*, which *Renton* cites,<sup>51</sup> and *O'Brien*, but in entirely different ways. *Renton*, unlike *Clark*,<sup>52</sup> does not formally impose any tailoring requirement, even though *Renton* does refer at a later point to considerations of tailoring.<sup>53</sup>

43. See *supra* note 33 and accompanying text; see also *City of Ladue v. Gileo*, 512 U.S. 43, 55-57 (1994) (distinguishing “laws that foreclose an entire medium of expression” from TPM regulations and ultimately finding insufficient remaining channels of communication to be available, pursuant to the *Clark* test).

44. See *supra* note 40 and accompanying text. Note that a test requiring ample available alternative speech channels may actually be more demanding, in some cases, than a test requiring rigorously narrow tailoring. See *infra* Section III.

45. *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

46. See, e.g., *Stardust, 3007 LLC v. City of Brookhaven*, 899 F.3d 1164, 1173-74 (11th Cir. 2018); *HH Indianapolis, LLC v. Consol. City of Indianapolis & Marion*, 889 F.3d 432, 438 (7th Cir. 2018); *Act Now to Stop War & End Racism Coal. v. District of Columbia*, 846 F.3d 391, 403 (D.C. Cir. 2017) (relying on the *Renton* test while also specifically referring to *Reed v. Town of Gilbert*, 135 S. Ct. 2218, 2226 (2015), on the scope of the content-neutral speech restriction category for a lamppost sign-posting regulation). Note that all of these cases post-date *Reed*'s tightening of the scope of content-neutrality. See *id.* at 2228; see also *Rodgers v. Bryant*, 942 F.3d 451, 456-57 (8th Cir. 2019) (anti-loitering regulation).

47. See *Renton*, 475 U.S. at 46-47.

48. See *id.* at 47 (citing *Clark v. Cmty. for Creative Non-Violence*, 468 U.S. 288, 293 (1984)). The later *Reed* case, 135 S. Ct. at 2228, appears to have overruled, without mentioning in the main opinion, the *Renton* Court's determination that regulations can be content-based on their face, but should still be treated as content-neutral, if they are justified without reference to speech content, but instead on the basis of harmful secondary effects associated with the regulated speech, such as littering or other petty crimes. See *id.* But see cases cited *supra* note 46 (citing *Renton*, 475 U.S. at 41). This unfortunate uncertainty over the distinction between content-based and content-neutral restrictions of speech contributes further to the force of our argument below.

49. *Renton*, 475 U.S. at 47. *Renton* thus at least refers to alternative speech channels, whether as generously as in *Clark*, 468 U.S. at 293, or not.

50. See, e.g., cases cited *supra* note 46.

51. See *Renton*, 475 U.S. at 47.

52. See *supra* note 33 and accompanying text; *Renton*, 475 U.S. at 47. *Renton* then later in the main opinion refers to sufficient tailoring. See *id.* at 52.

53. Note that the *Renton* majority included a total of seven of the Justices.

And *Renton*, unlike *O'Brien*,<sup>54</sup> does impose some form of a potentially crucial requirement that the regulation in question “not unreasonably limit alternative avenues of communication.”<sup>55</sup>

The law thus provides for three evidently distinct and independent tests for content-neutral<sup>56</sup> supposed time, place, and manner restrictions of speech. Ultimately, a judicial choice must be made from among these three alternatives, from some combination thereof, or some alternative thereto. But no such choice can be responsibly made until the purported distinction between TPM regulations and absolute prohibitions of speech is assessed and critiqued. This task is undertaken immediately below.

### III. THE TPM VERSUS BAN DISTINCTION IN PRACTICE:

#### PROBLEMS AND POSSIBILITIES

The free speech cases routinely attempt to distinguish between time, place, or manner restrictions and absolute bans or prohibitions of speech. These distinctions are typically drawn without any meaningful reflection, analysis, or even indirect recourse to any theory. While we should hardly expect courts in free speech cases to commonly do interesting theoretical work, the cases typically do not refer, even at second hand, to any theory of how the TPM versus absolute ban distinction is to be understood and applied. The typical case, as a result, fails to see the arbitrariness of its own assumedly intuitive judgments. The TPM versus absolute ban distinction is instead typically treated as sometimes tricky, but not interestingly problematic. As it turns out though, this casual judicial approach to the distinction is itself ultimately arbitrary.

The Supreme Court has addressed the TPM versus absolute ban distinction, in some fashion, on a number of occasions.<sup>57</sup> For example, in the

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54. See *supra* text accompanying note 40 (imposing a tailoring requirement, but no alternative speech channels requirement).

55. *Renton*, 475 U.S. at 47. The fact that *Renton*'s test plainly differs substantially, but in entirely different ways, from both *Clark* and *O'Brien* does not do much for the purported equivalence in practice of *Clark* and *O'Brien*. See *supra* note 36 and accompanying text.

56. Of course, under state law, it will often be permissible to adapt the distinction between content-based and content-neutral restrictions to more stringently protect speech. See, e.g., *Club SinRock, LLC v. Municipality of Anchorage*, 445 P.3d 1031, 1038 (Alaska 2019) (adult cabaret speech).

57. See, e.g., *Bd. of Airport Comm'rs of L.A. v. Jews For Jesus, Inc.*, 482 U.S. 569, 575 (1987); *44 Liquormart, Inc. v. Rhode Island*, 517 U.S. 484, 489, 501-02 (1996); *Frisby v. Schultz*, 487 U.S. 474, 483-85 (1988).



case of the major Los Angeles Airport terminal,<sup>58</sup> the Court appears to have been led by the perceived breadth and sweepingness of the speech restriction to classify the regulation on First Amendment activity as an absolute ban, rather than a mere TPM regulation.<sup>59</sup> The chosen spatial context seems to have been the geographic space normally available to passengers at the LAX airport.<sup>60</sup> Restrictions on speech within some geographically narrower sections of the airport might presumably have been classified, in contrast, as TPM regulations.

In the commercial speech context, the Court has addressed<sup>61</sup> state legislation that “prohibits [the relevant parties] from advertising in any manner whatsoever the price of any alcoholic beverage offered for sale in the State.”<sup>62</sup> The Court treated the regulatory scheme as a complete ban “on truthful, non-misleading commercial speech,”<sup>63</sup> and declared that “when a State entirely prohibits the dissemination of a truthful, non-misleading commercial message”<sup>64</sup> for paternalistic reasons, such prohibitions will be strongly disfavored.<sup>65</sup> The plurality concluded that “there is no question that Rhode Island’s price advertising ban constitutes a blanket prohibition against truthful, non-misleading speech about a lawful product.”<sup>66</sup>

Interestingly, the Court explicitly recognized the existence of a meaningful exception to what it nonetheless classified as a total ban on a particular kind of speech.<sup>67</sup> Specifically, the regulatory scheme clearly allowed for alcohol price advertising in the limited form and context of “price tags or signs displayed with the merchandise within licensed premises and not visible from the street.”<sup>68</sup>

Now, this exception to an otherwise more complete ban was plainly limited in scope and consequence. But it was also not trivial, in that price advertising competition is clearly permitted at the point at which the deci-

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58. See *Bd. of Airport Comm’rs*, 482 U.S. at 575 (“[N]o conceivable government interest would justify such an absolute prohibition of speech [within the main airport terminal area].”).

59. See *id.*

60. See *id.* This case’s opting to classify the regulation as a complete ban on speech has been relied upon or acknowledged by a number of cases, including *Preminger v. Sec’y of Veterans Affairs*, 517 F.3d 1299, 1317-18 (Fed. Cir. 2008); *Huminski v. Corsones*, 396 F.3d 53, 92-93 (2d Cir. 2005); *Parks v. Finan*, 385 F.3d 694, 703 (6th Cir. 2004); *United States v. Johnson*, 952 F.2d 565, 579 n.14 (1st Cir. 1991); *ACORN v. City of Tulsa*, 835 F.2d 735, 743 (10th Cir. 1987).

61. See *44 Liquormart*, 517 U.S. at 489.

62. *Id.* (quotation marks deleted).

63. See *id.* at 502.

64. *Id.* at 501.

65. See *id.*

66. *44 Liquormart, Inc.*, 517 U.S. 504 (Stevens, J.) (plurality opinion).

67. See *id.* at 489.

68. *Id.*

sion to purchase, or not purchase, from among competing brands is commonly made. So, some judicial explanation is necessary for treating a regulation with a practically meaningful exception as, nonetheless, a complete prohibition.<sup>69</sup> After all, the Court is not thereby following standard usage. A “complete ban” on, say, music, that exempted some folk music would not be recognized, for ordinary purposes, as in fact a complete ban on music. A “complete ban” on speech except for a few minutes before and after sunset would similarly not ordinarily be deemed a genuinely “complete ban” at all.

Equally interestingly, the Court has also treated what in a sense might constitute complete prohibitions of speech as, instead, mere time, place, or manner restrictions. In *Frisby v. Schultz*,<sup>70</sup> the Court addressed a town ordinance “that completely bans picketing ‘before or about’ any residence,”<sup>71</sup> including from traditional public fora such as sidewalks.<sup>72</sup> It could thus be said that the ordinance absolutely prohibited, in its entirety, the speech activity describable as focused or directed picketing.<sup>73</sup>

Yet the Court did not treat the ordinance in *Frisby* as a complete ban. There are, after all, a number of picketing, marching, demonstrating, and other protest messaging techniques, arguably quite similar in character in some requests, that remain unregulated by the “focused” picketing restriction at issue.<sup>74</sup> Protesters may still march into residential neighborhoods, go door- to-door, and distribute literature.<sup>75</sup> Thus, it was held in *Frisby* that “the ordinance permits the more general dissemination of a message.”<sup>76</sup> As a presumably content-neutral restriction of the time, place, and manner of speech, the ordinance was thus subject to one of the available tests for such regulations.<sup>77</sup>

Not surprisingly, the Supreme Court's arbitrariness as to the TPM versus absolute ban distinction has resulted in pervasive arbitrariness at the court of appeals level. Thus, a statute prohibiting the in-person and the written solicitation of workers' compensation claimants, while leaving other forms of client solicitation unregulated, was classified as “a complete

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69. See *supra* notes 62-66 and accompanying text.

70. *Frisby v. Schultz*, 487 U.S. 474 (1988).

71. *Id.* at 476.

72. See *id.* at 480.

73. See *id.* at 483.

74. See *id.* at 483-84.

75. *Frisby*, 487 U.S. at 483-84.

76. *Id.* at 483.

77. See *id.* at 481, 484 (requiring that the presumably content-neutral restriction of the time, place, and manner of the speech be “narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication”) (citing *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 480 U.S. 37, 45 (1980) (public forum case)). The test in *Perry* is thus closely akin to what we have referred to as the *Clark* test, *supra* note 33 and accompanying text.

ban,”<sup>78</sup> and “thus . . . incompatible with the First Amendment.”<sup>79</sup> But in contrast, an ordinance prohibiting all sitting or standing on street medians less than a yard wide,<sup>80</sup> and thus not completely banning panhandling or soliciting,<sup>81</sup> was classified merely as “a restriction on sitting or standing”<sup>82</sup> on the medians in question.<sup>83</sup> The presumed TPM restriction<sup>84</sup> in question was then addressed under the *Clark*<sup>85</sup> test.<sup>86</sup>

Regulations of the use of portable commercial outdoor signs, whether or not exceptions are made for temporary uses, are commonly treated not as restrictions on the time, place, or manner of commercial speech, but as complete bans on the affected speech.<sup>87</sup> Again, we would need some as yet unsupplied theory as to why such regulations, given any exceptions thereto, as well as the remaining range of alternative means of advertising commercially, could not equally be treated as TPM regulations. In the meantime, we would also have to face the striking anomaly that some restrictions classed as TPM regulations are in practice broader and more substantively restrictive of speech than some restrictions classed as flat bans.

Any number of other cases could be cited in which speech restrictions are classed as either TPM regulations or else as complete bans of some forms of speech, but where the reason for the classification is left underdeveloped.<sup>88</sup> Cases such as, for further example, the complete prohibition of

78. *Bevan & Associates, LPA v. Yost*, 929 F.3d 366, 379 (6th Cir. 2019).

79. *Id.*

80. *See Evans v. Sandy City*, 944 F.3d 847, 852 (10th Cir. 2019).

81. *See id.* at 853.

82. *Id.*

83. *See id.*

84. *See id.*

85. *See supra* note 33 and accompanying text.

86. *See Evans*, 944 F.3d at 854.

87. *See, e.g., FF Cosmetics FL, Inc. v. City of Miami Beach*, 866 F.3d 1290, 1300 (11th Cir. 2017) (referring to *Messer v. City of Douglasville*, 975 F.2d 1505, 1510 (11th Cir. 1992) and its “complete ban on off-premises signs in the . . . historic district”) (applying the commercial speech test of *Central Hudson v. Pub. Serv. Comm’n*, 447 U.S. 557, 566 (1980)) (requiring reasonably proportionate tailoring, but ignoring any alternative speech channels analysis); *Don’s Porta Signs, Inc. v. City of Clearwater*, 829 F.2d 1051, 1052 & 1052 n.2 (11th Cir. 1987) (portable sign regulation permitting some temporary portable signs apparently treated, by consent, as a “total ban” subject to the *Central Hudson* test, *supra*, again rejecting any inquiry into any alternative available channels of commercial expression); *Harnish v. Manatee Cty.*, 783 F.2d 1535, 1538-39 (11th Cir. 1986) (prohibition of portable and changeable-copy temporary signs, but not of other signs or forms of commercial advertising, treated as a total ban and adjudicated under *Clark*, *supra* note 33 and accompanying text). In the commercial speech contexts, the Court has referred to “flat prohibitions of speech” when the real target is only commercial speech that is actually or potentially misleading. *See Zauderer v. Office of Disc. Counsel*, 471 U.S. 626, 651 (1985).

88. *See, e.g., Doe v. Landry*, 909 F.3d 99, 116 (5th Cir. 2018) (rejecting the plaintiff’s claim of a “‘total ban’ on erotic dancing for individuals who are eighteen to twenty

all message-bearing tattoos, while leaving unregulated all other means of expressing one's idea, illustrate the basic untenability of the underlying distinction itself. It turns out that all TPM restrictions may be reconceived as also, if not instead, flat prohibitions on some judicially relevant class of speakers or speech.

But even if someone wishes to reject this conclusion, and to deny that supposed TPM regulations are often more speech-burdening than some supposed bans, it remains clear that TPM regulations may, at a minimum, verge upon, and have the same effects as, a supposed complete prohibition of speech. Clearly, TPM regulations can in some instances shade gradually into what is thought of as an absolute prohibition. Thus, barring speech in all possible venues and media, twenty-four hours per day, may be thought of as a complete prohibition. Allowing speech for some period of time, in one or more venues, would presumably then amount to a narrower TPM regulatory regime on speech. But if the times and places left unregulated are minimal--perhaps only an hour or a minute a day, in only one dubious venue, should we change, and reduce the stringency of, the free speech test because now only a broad TPM regulation is involved?<sup>89</sup> And suppose that the penalty for violating the complete ban is relatively light, but relatively severe for violating the still quite broad TPM regulation.<sup>90</sup> Should we really continue to see the presumed absolute prohibition as the greater threat to free speech, or as meriting a separate and more demanding test?

If we were indeed able to develop a coherent, consistent, and practically useful distinction between TPM regulations and absolute bans, we might then be able tap into today's philosophical discussions of what is called

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years old" on the grounds that the regulation referred only to alcohol-licensed establishments); *Genusa v. City of Peoria*, 619 F.2d 1203, 1218 (7th Cir. 1980) (denying local adult book store ownership rights to persons convicted within the four previous years of any felony or various morals-related crimes is treated as a total prohibition with respect to the persons affected); *Hawkins v. City & Cty. of Denver*, 170 F.3d 1281, 1288 (10th Cir. 1999) (Galleria Mall as imposing "an absolute ban on leafletting and picketing in the Galleria" while allowing promotional leaflets by Mall tenants, as well as leaving unaffected all other venues in which anyone might permissibly speak); *Indus. Acoustics Co. v. NLRB*, 912 F.2d 717, 721 (9th Cir. 1990) (labor case referring to a rule that "is clear in its absolute prohibition of campaign speeches made within 24 hours of an election, on company time, to massed workers"). Or consider an absolute prohibition of all tattoos that would otherwise qualify as speech. Why not view such a prohibition as (also) merely a regulation, whether constitutionally justified or not, of the manner in which one speaks? For discussion of this unclear "denominator" or "baseline" problem, see Joseph Blocher, *Bans*, 129 *YALE L.J.* 308, 312 (2019).

89. Otherwise put, bans are on, this view, merely the extreme or "limiting case." This logic applies whether the restriction in both cases is content-neutral or content-based.

90. For general background, but only partially under a free speech, as distinct from a procedural due process, perspective, see *Forsyth Cty. v. Nationalist Movement*, 505 U.S. 123 (1992).

mereology, or the study of parts and wholes,<sup>91</sup> as well as the mathematics of sets and proper subsets.<sup>92</sup> But we have no such worthwhile distinction.<sup>93</sup>

Perhaps the best we could then do would be to instead draw from the literature on the level of generality at which a legal issue should best be framed.<sup>94</sup> The literature on choosing some particular level of generality recognizes that describing a series of events in general terms may make those events seem more foreseeable than those same events described with greater specificity.<sup>95</sup> Whether we choose, for example, to describe a person generally as a biological father or, more specifically, as an apparently adulterous father of a child in an intact family,<sup>96</sup> may steer a legal case one way or another. We seem, on this approach, to need the proper level of focus--a wide angle perspective versus a perspective featuring close-up detail, as it were--with which to best appreciate what is crucially at stake in the case.<sup>97</sup>

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91. See GIORGIO LANDO, *MEREOLGY: A PHILOSOPHICAL INTRODUCTION* (2018); PETER SIMONS, *PARTS: A STUDY IN ONTOLOGY 1* (2003 ed.) (1987) (mereology as involving formal theories of parts, wholes, and concepts related thereto); Archie J. Baum, *Wholes and Parts*, 3 SW. J. PHIL. 17, 21 (1972) (“[T]here are various kinds of wholes, parts, and whole-part relations.”); Kit Fine, *Towards a Theory of Parts*, 107 J. PHIL. 559, 561 (2010) (applying the part-whole categories to abstractions, not just to concrete objects); Kris McDaniel, *Parts and Wholes*, 5 PHIL. COMPASS 412, 413 (2010) (same); Achille Varzi, *Mereology*, STAN. ENCYCLOPEDIA PHIL. (May 13, 2003), <https://plato.stanford.edu/entries/mereology> [<https://perma.cc/QFX9-J78G>].

92. See, e.g., PATRICK SUPPES, *INTRODUCTION TO LOGIC* 177-82 (John L. Kelley et al. eds., 1999 ed.) (1957) (on basic set and proper subset theory); Joan Bagaria, *Set Theory*, STAN. ENCYCLOPEDIA PHIL. (Oct. 8, 2019), <https://plato.stanford.edu/entries/set-theory> [<https://perma.cc/SC9E-A5Q3>]. In the legal context, see Jeremy N. Sheff, *Legal Sets*, 40 CARDOZO L. REV. 2029, 2031 (2019) (“Set-based logic permeates mature legal systems, and constitutes the deep structure connecting legal authorities to the behavior of legal actors.”); *id.* at 2042 & 2042 n.30 (defining proper subsets in a way applicable to a coherent distinction between partial and complete speech regulations).

93. And the part-whole and set theory discussions, *supra* notes 91 and 92, do not materially help us to develop any such distinction.

94. See, e.g., Laurence H. Tribe & Michael C. Dorf, *Levels of Generality in the Definition of Rights*, 57 U. CHI. L. REV. 1057 (1990); Mark V. Tushnet, *Following the Rules Laid Down: A Critique of Interpretivism and Neutral Principles*, 96 HARV. L. REV. 781, 791 (1983) (“Frequently an analysis turns completely on the level of generality at which some feature of the issue under analysis is described.”); Blocher, *supra* note 88, at 329.

95. *But cf.* DANIEL KAHNEMAN, *THINKING, FAST AND SLOW* 156-57 (2013) (hypothetical feminist bank teller study), in which additional detailed requirements are widely thought to somehow add to the probability of the overall account.

96. See *Michael H. v. Gerald D.*, 491 U.S. 110 (1989) (classic debate between Justice Scalia and Brennan).

97. What might seem, under one photographic description, to be a highly magnified image of carpet filaments or dust might be more illuminatingly presented instead as an image, at an immense distance, of the so-called “Pillars of Creation” gas clouds in the Eagle Nebula, with the “threads” themselves covering a distance of perhaps half a dozen light years. See *The Pillars of Creation*, NASA (Feb. 22, 2018), [www.nasa.gov/image-feature/the-pillars-of-creation](http://www.nasa.gov/image-feature/the-pillars-of-creation) [<https://perma.cc/4HUK-WFKZ>].

Perhaps this inquiry into determining the proper level of generality in best describing the facts and circumstances of a case could be modified, and then applied to questions of whether to find a complete speech ban or else a TPM regulation.

Choosing a single best level of generality of a legal description is, however, noticeably plagued by “indeterminacy and manipulability.”<sup>98</sup> Clearly, “there is no universal metric of specificity against which to measure an asserted right.”<sup>99</sup> Crucially, choosing the best level of generality of a legal description and our own problem herein of choosing between the categories of total ban and TPM regulation suffer from a similar fundamental problem. In our context, making the best, most value-illuminating choice is, realistically, not merely a preliminary step toward eventually deciding the case on the constitutional merits. That is, the best, most value-illuminating choice as between the analytical labels of ban and TPM regulation requires that the court already more or less fully understand the relevant free speech and other interests, including their nature and weight, at stake in the case. The courts thus must fully grasp all that is of genuine significance in a case in order to perform well the supposedly preliminary task of choosing between the labels of ban and TPM regulation. Equally importantly, though, even if the courts could somehow, at any stage, make independent, value-sensitive, and non-arbitrary judgments as to whether to characterize any given speech restriction as a ban or a TPM regulation, that characterization would then still be hostage to whatever deficiencies afflicted the remainder of any overall judicial test the court then chose to apply.<sup>100</sup>

In particular, the judicial choice between the ban versus TPM categories typically depends, either as a prerequisite, or as a further element of the test to be applied,<sup>101</sup> on the distinction between content-neutral and content-based restriction on speech.<sup>102</sup> A court's classifying a speech restriction as a TPM regulation or as total ban does not allow the court to somehow bypass

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98. Paul Brest, *The Fundamental Rights Controversy: The Essential Contradictions of Normative Constitutional Scholarship*, 90 YALE L.J. 1063, 1084 (1981) (quoted in Tribe & Dorf, *supra* note 94, at 1071).

99. Tribe & Dorf, *supra* note 94, at 1086.

100. See the various non-equivalent tests described *supra* Section II. For a more optimistically constructive approach to the ban versus TPM distinction, see Blocher, *supra* note 88, at 315-16.

101. The flag burning symbolic speech case of *Texas v. Johnson*, 491 U.S. 397 (1991), could be thought of as either applying the *O'Brien* test, 391 U.S. 367 377 (1968), and finding the *O'Brien* test to have been failed, or else as applying strict judicial scrutiny to a content-based restriction on political speech.

102. See the tests cited *supra* Section II.

the crucial deficiencies of the content-based versus content-neutral distinction.<sup>103</sup>

This dependence on the further judicial category of content-based versus content-neutral restrictions on speech would be tolerable if this category were in general reasonably consistently managed. But it is not. The TPM versus total ban distinction is thus currently tied to a further category that is of questionable utility and is burdened with its own frequent arbitrariness.

The dubiousness of the content-based versus content-neutral speech restriction distinction manifests itself in a number of ways. First, the Court itself has introduced compounding uncertainty as the scope of the basic idea of a content-based restriction on speech.<sup>104</sup> Under the *Reed* case,<sup>105</sup> the Court appears willing to impose strict judicial scrutiny on some regulations, whether of commercial speech or not, where no significant current or future risk to the unimpaired exchange of ideas is presently detectable.<sup>106</sup>

Second, what counts as a sufficiently compelling government interest<sup>107</sup> for the strict scrutiny required of content-based restrictions is itself vulnerable to the problem of choosing a proper level of generality of description.<sup>108</sup> Broadly formulated government interests may seem more important than the same underlying interests more narrowly and specifically described. Regardless, while we might think of a compelling government interest as an interest “of the highest order,”<sup>109</sup> the courts have, oddly, gone so far as to recognize as compelling the government interest in the protection of golden, rather than bald, eagles, whether threatened as a species or not.<sup>110</sup> This curious, but not unparalleled, outcome calls into question the judicial methodology for assigning constitutional weight to a government interest.

Third, strict scrutiny is now sometimes held to require not only a compelling government interest, and perhaps some only vaguely specified de-

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103. For the most recent explication of this distinction, leaving a number of important questions unaddressed, see *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015). For a useful survey and critique, see Dan V. Kozlowski & Derigan Silver, *Measuring Reed’s Reach: Content Discrimination in the Courts of Appeal After Reed v. Town of Gilbert*, 29 COMM. L. & POL’Y 191 (2019).

104. See, e.g., the unresolved questions as to the scope of a content-based restriction left unresolved by the Court in *Reed*, as documented by Kozlowski & Silver, *supra* note 103.

105. See the sources cited, *supra* note 103.

106. Or at least, no greater risk thereto than would be posed by an assumedly content-neutral restriction of speech.

107. For useful background, see, for example, R. George Wright, *Electoral Lies and the Broader Problems of Strict Scrutiny*, 64 FLA. L. REV. 759 (2012).

108. See *supra* notes 94-99 and accompanying text.

109. See *Wisconsin v. Yoder*, 406 U.S. 205, 215 (1972).

110. See *United States v. Wilgus*, 638 F.3d 1274, 1285 (10th Cir. 2011) (citing *United States v. Hardiman*, 297 F.3d 1116, 1128 (10th Cir. 2002)).

gree of actual promotion or advancement thereof, but as well a compelling or convincing evidentiary basis in the record for the government's logic of regulation.<sup>111</sup> In a world of multiple interacting causal factors, a judicial test for the degree of “compellingness” of the evidentiary or causal logic of a regulation will unavoidably be speculative and indeterminate.<sup>112</sup>

Fourth, there is the current rise in some but not yet all contexts of what is referred to as “exacting scrutiny.”<sup>113</sup> Exacting scrutiny is often thought of not as a synonym for strict scrutiny, but as some sort of a merger or dilution of strict scrutiny with a form of proportionalism<sup>114</sup> balancing of the interests and rights claims at stake in the case.<sup>115</sup> Whatever the merits of such arguments within, or as a substitute for, strict scrutiny, these further complications add to the murky indeterminacies of strict scrutiny and its alternatives.

Fifth and finally, the need for TPM or even complete ban regulations to accommodate the content-neutral versus content-based distinction means that the case law will be held hostage to the specific further indeterminacies of judicial findings as to narrow tailoring.<sup>116</sup> There is, realistically, little constraint on judicial declarations that some supposedly less speech-burdensome regulation would, or would not, likely be feasible<sup>117</sup> and would

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111. See, e.g., *Am. Amusement Machine Ass'n v. Kendrick*, 244 F.3d 572, 576 (7th Cir. 2001) (Posner, J., for the court).

112. See Jim Manzi, *What Social Science Does—and Doesn't—Know*, CITY JOURNAL 2010), <https://www.city-journal.org/html/what-social-science-does—and-doesn't-know-13297.html> [https://perma.cc/9NZM-Q69Y] (discussing issues of “causal density”).

113. See, e.g., *United States v. Alvarez*, 567 U.S. 709, 715 (2012) (“When content-based speech regulation is in question . . . exacting scrutiny is required.”). See *id.* at 720, 724 (quoting *Turner Broad. Sys. v. FCC*, 512 U.S. 622, 642 (1984)).

114. For background on moral and constitutional forms of proportionalism, including the First Amendment context, see AHARON BARAK, *PROPORTIONALITY: CONSTITUTIONAL RIGHTS AND THEIR LIMITATIONS* (David Dyzenhaus et. al. eds., Doron Kalir, trans., Cambridge Univ. Press 2012); Robert Alexy, *Constitutional Rights, Balancing, and Rationality*, 16 *RATIO JURIS* 131 (2003). For a response, see FRANCISCO J. URBINA, *A CRITIQUE OF PROPORTIONALITY AND BALANCING* (2017).

115. See generally R. George Wright, *A Hard Look at Exacting Scrutiny*, 85 *UMKC L. REV.* 207 (2016).

116. For background and complications, see R. George Wright, *The Fourteen Faces of Narrowness: How the Courts Legitimize What They Do*, 31 *LOY. L.A. L. REV.* 167 (1997).

117. See, e.g., 44 *Liquormart, Inc. v. Rhode Island*, 517 U.S. 484 (1996) (the speculative assumptions as to what might be politically viable at the state level, as alternative forms of regulation in the commercial speech regulation).



still materially and substantially advance<sup>118</sup> one or more government interests.<sup>119</sup>

Perhaps the most basic problem in judicial narrow tailoring inquiries is that the regulating government will typically have only incomplete and unreliable information as to the actual effects of its policies and of alternatives thereto.<sup>120</sup> Meanwhile, the affected parties recognize that their distinctive free speech interests may well diverge from their own much broader, overall interests.<sup>121</sup> More exotically, it is also possible that a judicial declaration that a regulation is or is not narrowly tailored may itself affect the system that the court is attempting to predict or describe,<sup>122</sup> so as to in fact now make some alternative rule either politically feasible or infeasible.<sup>123</sup>

As it happens, though, this dependence of the TPM versus flat prohibition distinction on the increasingly murky distinction between content-based and content-neutral regulations is not inevitable. The interests of both governments and private speakers can instead best be promoted in the TPM versus prohibition cases by abandoning judicial inquiries into degrees of policy tailoring, narrow or otherwise. Tailoring inquiries, as it turns out, commonly miss the point.

Instead, speakers, insofar as they care about their speech, and the value, meaningfulness, and effectiveness of that speech, should logically care not about degrees of tailoring of the speech regulation in question, but instead about whether the regulation leaves them with better, the same, or less valuable alternative channels and venues in which to speak, in light of their own free speech values and priorities.<sup>124</sup> Degrees of narrowness of tailoring

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118. For discussion of the constitutional significance of questions such as how far, how much, or how substantially, a government regulatory interest has been promoted in practice, see R. George Wright, *Wiping Away the Tiers of Judicial Scrutiny*, 93 ST. JOHN'S L. REV. (forthcoming 2020).

119. Despite continual gross oversimplification by courts, we should realistically assume that regulations of speech, whether thought of as TPM or total bans, do not generally aim at promoting only some single overriding and readily articulated government interest. It would still be unrealistic, but distinctly less so, to assume that any given speech regulation seeks to promote some complex function of partly overlapping and partly competitive goods.

120. See Wright, *supra* note 118.

121. Note, for example, that a proposed rule might maximize a regulated party's free speech values, but at some cost, overall, to that party's profitability. All such cases may tend to skew the speaker's testimony as to the actual free speech impact of alternative regulations.

122. The idea of significantly changing a system merely by observing or describing that system amounts to a popular expansion of the Heisenberg Uncertainty Principle. See generally Jan Hilgevoord, *Uncertainty Principle*, STAN. ENCYCLOPEDIA PHIL. (Oct. 8, 2001), <https://plato.stanford.edu/entries/qt-uncertainty> [<https://perma.cc/L2D8-C93H>].

123. Merely as one possible example, a court's declaration that some alternative policy would be more narrowly tailored may itself, for the first-time, focus public attention on, render conspicuous, and legitimize that otherwise politically infeasible policy.

124. Cf. Blocher, *supra* note 88, at 327 (asking "what practical impact [a ban, specifically] has on a rightsholder's ability to effectuate his or her constitutional interests"). For a

may have only a minimal, if any, relationship to the degree to which a regulation harms a speaker, given that speaker's own best remaining alternative speech channels,<sup>125</sup> in light of that speaker's own free speech values and priorities.<sup>126</sup> More broadly, speakers have little interest in whether they themselves, or the courts, classify a speech restriction as a TPM regulation or a total ban. Instead, speakers should logically care about their current and future speech options.

A regulation may not be at all well-tailored, and thus may cover an unnecessarily broad range of activities, while at the same time also leaving open and available a speaker's best speech channel options, or nearly best such options, from that speaker's own perspective. Imagine, say, an insufficiently tailored regulation of the use of campaign posters in the case of a billionaire electoral candidate who rarely or only minimally utilizes such posters, and who would lose essentially nothing, in terms of free speech values, by shifting such from poster-speech to some unregulated alternative speech channel.<sup>127</sup> And certainly, a speech regulation can be remarkably narrowly tailored, while leaving an affected speaker effectively mute.

Importantly, this emphasis on alternative speech channels holds regardless of whether a court chooses to categorize a speech restriction as one of TPM or as a complete ban. The courts can, and should, thus bypass the hopeless indeterminacies and sheer arbitrariness in trying to distinguish between TPM and complete ban regulations by focusing crucially on the availability, for the speaker, of constitutionally adequate alternative channels of communication. Certainly, what the courts have referred to as total bans on some class of speech<sup>128</sup> could, depending upon the circumstances, leave a given speaker's free speech values essentially unimpaired. Equally, what a court characterizes as a mere TPM regulation may have an unavoid-

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comprehensive view of the basic values thought to underlie and justify constitutional protection of speech, including the pursuit of truth or knowledge, democratic self-government, and the pursuit of autonomous self-realization and development, see Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

125. Otherwise put, speakers should logically care, as speakers, about the real opportunity costs, in free speech value terms, of complying with a speech regulation. See generally David R. Henderson, *Opportunity Cost*, LIBR. ECON. & LIBERTY, <https://www.econlib.org/library/Enc/OpportunityCost.html> [<https://perma.cc/LM86-6XQD>].

126. Which, again, may not correspond to the speaker's own broader, non-speech related values, including, say, corporate profitability.

127. Otherwise put, while it is doubtless true that a free speech right is "worthless in the absence of a meaningful method of its expression," *Cuviello v. City of Vallejo*, 944 F.3d 816, 825 (9th Cir. 2019), it is also true that even an insufficiently tailored, or overly broad, speech restriction does a given speaker no practical harm if that speaker retains equally, or more, valuable means of expressing their sentiments.

128. As illustrated by the purported "total ban" cases discussed *supra* Section II.

ably devastating impact on a given speaker who has no realistically available alternative speech channels.<sup>129</sup>

What, then, could typically make a real difference to a given speaker with regard to their free speech values? Otherwise put, insofar as a speaker cares about their own freedom of speech, what sorts of considerations might a speaker emphasize in assessing the value of any alternative channels in which to speak?

As it turns out, these crucial considerations will not depend upon any purported distinction between TPM regulations and speech prohibitions, or on the directly implicated distinction between content-based and content-neutral regulations. An absolute ban on the use of streets and sidewalks may be of minimal concern to a speaker who prefers to rely on social media. And a TPM regulation on speaking on Fridays may effectively censor someone who, for whatever reason, can speak only on Fridays.

Logic suggests that speakers, insofar as they care about their own freedom of speech, including any overlap with that of their audience, might focus, to one degree or another, on a number of considerations. Among these dimensions of free speech value would be: (1) the sheer size of an actual or potential audience, immediately or else indirectly and over time; (2) the costs of obtaining responsive feedback or ongoing dialogue with audience members; (3) the given medium or channel's capacity to handle nuance or detail; (4) the given medium or channel's capacity for emotional impact; (5) the given medium or channel's vulnerability to outages, technical decay, hacking, sabotage, blocking, manipulation, or private party or foreign government censorship; (6) the medium or channel's capacity for author-initiated editing or updating; (7) the likelihood of the message's widespread accessibility over a substantial period of time; (8) timeliness or immediate availability and download speeds; (9) prestige, or elite use of the medium channel in question; (10) the suitability, capacities, level of interest, influence, relevance, or appreciativeness of the likely audience; (11) financial and other costs of access to the medium or channel in question; (12) the capacity of the medium or channel for ready technical updating and for handling simultaneous multi-user demand for large amounts of data with reasonable reliability; (13) the medium or channel's capacity to protect the confidentiality or anonymity of listeners and speakers;<sup>130</sup> and (14) any

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129. Consider, for example, the impact on non-English speakers who lack translators of a rule restricting the ability to speak any language other than English in a government office. For background in the broader workplace context, see 29 C.F.R. § 1606.7 on broad and narrow English-only rules.

130. As in, classically, *Talley v. California*, 362 U.S. 60 (1960) (anonymous handbill case); *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334 (1995) (anonymous election and issue-related publications case).

important legal liability rules regarding speech and commentary on the medium or channel.

Of course, no particular speaker may care about most, let alone all, of these considerations in assessing the value, for free speech purposes,<sup>131</sup> of their alternative speech channels or media. Nor should we expect all speakers to seek to maximize their own freedom of speech at the expense of all other concerns, interests, and values.<sup>132</sup> But insofar as speakers care about their own freedom of speech, and necessarily therein about an audience, they rationally care about the free speech value of their remaining speech channels, rather than about issues of regulatory labeling and tailoring.

Crucially, no reasonable speaker should logically find any substantial free speech interest value in the entirely artificial, and ultimately arbitrary, distinction between time, place, and manner restrictions and absolute prohibitions of speech.

#### IV. CONCLUSION

Perhaps the most sense we can make out of the time, place, and manner versus absolute prohibition of speech distinction is that we normally tend to adopt the former label when the speech restriction happens to strike us, for whatever reason, as in some sense relatively narrow, and we adopt the latter label when it does not. The problem is that restrictions on speech do not come with unequivocally applicable measures of their practical narrowness and breadth. Narrowness and breadth of a restriction will always be relative to, and dependent upon, some descriptive and evaluative framework, which must be chosen, on whatever grounds, from among alternative, and more or less equally reasonable, such frameworks. No neutral standpoint, from which the best judgments of regulatory narrowness and breadth can be uniformly made, is available.

This realization should, more positively, allow us to de-emphasize, if not to dispense with, free speech tests, or components thereof, that do not closely correspond to the real speech and public interests and values at stake in any given case. Specifically, this realization should encourage courts, in deciding typical free speech cases, to focus more attentively on

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131. It is possible to prefer one speech channel to another for reasons irrelevant to one's wish to speak freely, or even for reasons contrary to broader, overall free speech values. Thus, a group might prefer to speak through sustained multi-person picketing in hopes of thereby intimidating, if not coercing, bypassers into a preferred behavior, without convincing anyone of the merits of the group's stance.

132. It is thus possible that a rule allowing for-profit commercial enterprises to advertise more uninhibitedly might actually be resisted by one or more of the affected commercial parties, as tending to cut into overall corporate profitability.

the free speech value, from the speaker's perspective, of any remaining alternative channels of speech left open and available to that speaker.